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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

v.

FRANCES B. DAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES AND RULES INVOLVED	4
STATEMENT OF THE CASE	7
SUMMARY OF ARGUMENT	15
ARGUMENT	22
I. Section 504 of the Rehabilitation Act permits denial of admission to a RN nursing program of an applicant whose handicap prevents her from being qualified to render safe nursing services	22
A. The language of Section 504	23
B. The interpretation of Section 504	30
C. The application of Section 504	41
II. Section 504 does not contemplate or authorize any kind of "affirmative relief" under the circumstances of this case	47
III. Section 504 creates no express or implied private right of action, at least before available administrative remedies have been exhausted, in the circumstances of this case	56
A. Reconsideration of the Lloyd rationale	58
B. No basis or need for implying private remedy	59

Page

C. Effect of 1978 Amendments 60

D. Doctrines of exhaustion and primary jurisdiction . . 63

CONCLUSION 66

CITATIONS

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 37

Barnes v. Converse College, 436 F.Supp. 635 (D. S.Car. 1977) 57

Bartels v. Biernat, 427 F.Supp. 226 (E.D. Wis. 1977) 56

Bradwell v. The State, 83 U.S. (16 Wall.) 130 (1872) 30

Camenisch v. University of Texas, No. A-78-CA-961 (W.D. Tex., May 17, 1978) 57

Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976, 1977), *pending for decision*, No. 77-926 . . 58, 63

Cort v. Ash, 422 U.S. 66 (1975) 59

Crawford v. University of North Carolina, 440 F.Supp. 1047 (M.D.N.C. 1977) 57, 64

Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided Court*, 402 U.S. 689 (1971) 54

Doe v. New York University, 442 F.Supp. 522 (S.D.N.Y. 1978) 57, 64

Dothard v. Rawlinson, 433 U.S. 321 (1977) 34

Page

Drennon v. Philadelphia General Hospital, 428 F.Supp. 809 (E.D. Pa. 1977) 56

Duran v. City of Tampa, 430 F.Supp. 75 (M.D. Fla. 1977) 57

Flora v. United States, 362 U.S. 145 (1960) 26

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 35, 37

Halderman v. Pennhurst State School, 446 F.Supp. 1295 (E.D. Pa. 1977) 57

Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974) 46

Immigration Service v. Errico, 385 U.S. 214 (1966) 28

Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) 56

Lau v. Nichols, 414 U.S. 563 (1974) 58, 59

Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977) 56

Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977) 20, 56, 57, 58, 59, 63, 64

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) 65

Nader v. Allegheny Airlines, 426 U.S. 290 (1976) 65

Rogers v. Frito-Lay, Inc., 433 F.Supp. 200 (N.D. Tex. 1977) 57

Roschen v. Ward, 279 U.S. 337 (1929) 23

Sherer v. Waier, 457 F.Supp. 1039 (W.D. Mo. 1978) 57

Page

Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) 46

Teamsters v. United States, 431 U.S. 324 (1977) 63

Trageser v. Libbie Rehabilitation Center, 18 F.E.P. Cases 1141 (4th Cir., Dec. 18, 1978) 32, 61

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 56

United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977) 56

United States v. Mississippi, 380 U.S. 128 (1965) 17, 28

United States v. Wurzbach, 280 U.S. 396 (1930) 29

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 46

Vanko v. Finley, 440 F. Supp. 656 (N.D. Ohio, 1977) 57, 65

Statutes and Rules:

Rehabilitation Act of 1973, as amended:

Section 7, 29 U.S.C. §706 4
Section 500, 29 U.S.C. §790 31
Section 501, 29 U.S.C. §791 . . . . . 31, 51, 61
Section 503, 29 U.S.C. §793 . . . . . 31, 51, 52
Section 504, 29 U.S.C. §794 4, *passim*
Section 505, 29 U.S.C. §795 . . . . . 6, 60, 61, 62

Civil Rights Act of 1870, 42 U.S.C. §1971 28

Civil Rights Act of 1871, 42 U.S.C. §1983 2

Page

Civil Rights Act of 1964, 42 U.S.C. §2000d to e . . 6, 32, 36, 61

N.C.Gen.Stat. Ch. 90, Art. 9 (1975) 34, 42, 43, 45

H.E.W. Regulations:

41 C.F.R. Part 60-1, *et seq.* 32, 35, 36, 52
45 C.F.R. Part 81 64
45 C.F.R. Part 84 . . . . . 5, 6, 24, 27, 30, 32, 33, 37, 39, 40, 47, 54, 55, 64

Miscellaneous:

S.Rep.No. 93-318, 93d Cong., 1st Sess. (1973) 31

S.Rep.No. 93-1297, 93d Cong., 2d Sess. (1974) 60

S.Rep.No. 95-890, 95th Cong., 2d Sess. (1978) 63

119 Cong.Rec. 24587 (1973) 32

124 Cong.Rec. S 15590-15593 (Sept. 20, 1978 daily ed.) . . 63

Oversight Hearings on Rehabilitation of the Handicapped Programs, before Subcomm. on the Handicapped of the House Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. (1976) 33

Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse*, 29 Mercer L.Rev. 745 (1978) 57

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Follett, *Modern American Usage* (1966) 27

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Page

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Lesnik, *Nursing Practice and the Law* (2d ed. 1962) . . . 45, 46

Nicholson, *A Dictionary of American-English Usage* (1957) 27

Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 So.Cal. L. Rev. 785 (1976) 52

Note, *Equal Employment and the Disabled: A Proposal*, 10 Colum. J.L. & Soc. Prob. 457 (1974) 32

Note, *Rehabilitating the Rehabilitation Act of 1973*, 58 B.U. L. Rev. 247 (1978) 41, 52

St. Antoine, *Affirmative Action: Hypocritical Euphemism or Noble Mandate?* 10 U. of Mich. J. Law Reform 28 (1976) 52

Standards for Education Units in Nursing (N.C. Bd. of Nursing, 1967) 42

Webster's Third New International Dictionary 23, 26

Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 Emory L.J. 65 (1977) 32, 57

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BRIEF FOR PETITIONER

Southeastern Community College, the petitioner herein, prays that this Court, upon a full review of the arguments and the record, reverse the judgment of the United States Court of Appeals for the Fourth Circuit, with directions that the judgment of the United States District Court for the Eastern District of North Carolina, in favor of the petitioner, be reinstated.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 574 F.2d 1158, and is reprinted in Appendix A of the petition for certiorari, p. 2a.

The opinion of the United States District Court for the Eastern District of North Carolina, in the form of findings of fact and conclusions of law, is reported at 424 F.Supp. 1341, and is reprinted in Appendix B of the petition for certiorari, p. 12a.

JURISDICTION

Frances B. Davis, the respondent, brought this civil action under the Rehabilitation Act of 1973, 29 U.S.C. § 794, and under the Civil Rights Act of 1871, 42 U.S.C. § 1983, complaining that the petitioner College had unlawfully denied her admittance to its nursing program because of her admitted hearing disability. On December 22, 1976, the District Court entered a final judgment dismissing the action for lack of constitutional and statutory merit. See Appendix B of the petition for certiorari, p. 12a; 424 F. Supp. 1341.

On the respondent's appeal, the Fourth Circuit on March 28, 1978, affirmed the District Court's judgment in part, vacated the judgment in part, and remanded the case to the District Court for further proceedings. See Appendix A of the petition for certiorari, p. 2a; 574 F.2d 1158. On June 29, 1978, the Fourth Circuit denied both a petition for rehearing and a suggestion for rehearing en banc, although there were dissents from both denials. See Appendix A of the petition for certiorari, p. 1a, 574 F.2d at 1163. Following an extension of time, the petition for

certiorari was timely filed on October 27, 1978. This Court granted the petition on January 8, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides that no "otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in . . . any program or activity receiving Federal financial assistance." The questions here presented are:

1. Whether Section 504 of this Act precludes a public college from basing a denial of admission to the college's Associate Degree Nursing Program solely upon an admittedly severe hearing handicap of the applicant, where it was shown that the handicap could interfere with the applicant's ability to provide safe patient care both as a student nurse and as a potential Registered Nurse.

2. Whether Section 504 of this Act impliedly imposes upon colleges and universities an affirmative obligation to provide affirmative and expensive accommodation for the seriously handicapped who seek admission to programs designed to train and educate them for professional employment involving a high degree of physical and mental dexterity.

3. Whether Section 504 of this Act impliedly gives rise to a private right of action in a federal court by a handicapped individual who has been denied admission to a college's nursing program because of the physical handicap.

4. Whether, if such private right of action is implied,

the handicapped applicant must first pursue and exhaust available H.E.W. administrative remedies respecting individual complaints of discrimination.

STATUTES AND RULES INVOLVED

Section 7 of the Rehabilitation Act of 1973, 29 U.S.C. § 706, as amended:

(6) The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the*

Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

[Emphasis added indicates amendment to Section 504 by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2982 (1978) ("the 1978 Amendments").

H.E.W. Regulations implementing Section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84:

§ 84.3 *Definitions.*

As used in this part, the term:

* *

(k) "Qualified handicapped person"means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

* *

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376:

Definitions – 5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped

person." Throughout the regulation this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 377:

Section 84.3(k)(3) . . . defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 795, added by the 1978 Amendments:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000c-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section

501 of this Act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.

(b) In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Respondent Davis brought this civil action in the District Court for the Eastern District of North Carolina against the petitioner Southeastern Community College, a public educational institution located at Whiteville, N.C. The District Court found that it had subject matter jurisdiction under 28 U.S.C. § 1343(3) to consider two federal statutory claims asserted by Davis:

(A) A claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, alleging that the College had unlawfully discriminated against Davis by denying her

admission to its Associate Degree Nursing Program by reason of an obvious and admitted hearing disability; and

(B) A claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging that the College, by denying her admission on that basis, had also denied Davis the right to due process and equal protection of the laws. This § 1983 claim, however, is not presently in issue, the Fourth Circuit having rested its decision solely on considerations stemming from Section 504 of the Rehabilitation Act. See footnote 4 of the opinion below.

The relevant factual predicates of the Section 504 issues are found in the twelve Findings of Fact rendered by the District Court after a full evidentiary hearing. See Appendix B of the petition for certiorari, pp. 13a-17a; 424 F. Supp. at 1342-1344. For the most part, those findings are uncontested, and reflect the following facts of record:

(1) The central fact in this case is that Davis, according to an independent audiologist associated with Duke University Medical Center, has long had "a severe impairment of her ability to hear, which was detected early in the admission process," and "has a moderately severe hearing loss in the right ear and a severe hearing loss in the left ear . . . [and] a speech discrimination loss which results in remarkable difficulty in understanding speech because of the distortion in her hearing." Finding 7.[1] However, by using a

[1] According to the audiologist's report (App. 124a-125a), Davis reported that she had had this hearing loss for many years, that her father and two sisters have significant hearing losses, and that she had worked in a dry cleaning plant for three years. She was born in 1932. App. 116a.

It is unquestioned that Davis is a "handicapped person" within the statutory sense. 29 U.S.C. §706(6) includes a serious hearing defect as a physical impairment "which substantially limits one or more of such person's major life activities."

hearing aid and reading lips, "she is skillful in communicating with other people if she wears her hearing aid and is allowed to see the talker and use her vision to aid her in interpreting the speech of others." Finding 7. While Davis was found to be aware of gross sounds in the listening environment and to reach the outer limits of normal hearing levels with the use of hearing aids, the audiologist concluded that Davis "can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker." App. 128a.

(2) In 1967, Davis was duly qualified by the North Carolina authorities as a Licensed Practical Nurse. While there was no evidence that she was continuously employed in that position, the license is currently in good standing. But the testimony at trial indicated that a Licensed Practical Nurse, unlike a Licensed Registered Nurse, "operates under constant supervision and is not allowed to perform medical tasks which require a great degree of technical sophistication." Finding 5.

(3) Davis was enrolled at the petitioner College during the 1973-74 academic year in the undergraduate College Parallel program, designed as preparatory for entrance into the College's Associate Degree Nursing Program. The latter program was structured to train persons to become eligible for testing and licensing, by North Carolina authorities, as Registered Nurses. Findings 2, 4.

(4) Davis successfully completed her courses in the College Parallel program, and thereupon sought admission to the Associate Degree Nursing Program. The College had established criteria for admission to that program, including not only scholastic criteria but an evaluation of the

physical condition of the applicant.[2] At the time of Davis' application in 1974, there were in excess of 100 applicants for admission and only 45 available positions to be filled for the quarter in which Davis applied. Finding 6.

(5) In implementing the College's admission criteria, Davis was interviewed by professional members of the College's nursing program staff to determine her suitability for admission to the program. Because of her obvious hearing impairment, Davis was referred to an independent audiologist at Duke University Medical Center for an evaluation of her hearing disability. The findings and conclusions of the audiologist have been summarized in Paragraph (1) above; see also App. 124a-125a, 127a-128a, and Finding 7.

(6) In the course of its review of Davis' suitability for the nursing program, the College submitted the audiologist's reports to the Executive Director of the North Carolina Board of Nursing and requested her advice as to Davis' acceptability as a potential Registered Nurse. The Executive Director responded (App. 132a-134a) that

> ". . . Mrs. Davis's hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, . . . we would question the advisability of you and the faculty's assuming responsibility for Mrs. Davis's involvement in patient care as a student in nursing. To adjust patient learning experiences in keeping with Mrs. Davis's hearing limitations could

[2] The College's admission criteria, made available to all prospective applicants for the Associate Degree Nursing Program, required that the following item be included in each student's application folder: "Medical record – serious consideration given to existing health problems." App. 112a. See also Finding 12.

> in fact, be the same as denying her full learning to meet the objectives of your nursing programs.
>
> "The basis for our opinions is found in the audiologist's response to you from Duke University on April 25, and the relationship of this response to expectations of nurses in patient care. . . . Both you and I can identify innumerable patient care situations in which this lady's abilities as defined in the [audiologist's response] would be inadequate for her probably to identify all of the patient's needs for which she would be accountable or even to pick up some clues to situations that could be quite critical to the point of life, death, situations.
>
> ". . . We would urge the college in counselling Mrs. Davis to alter her career goal, as we do not believe, on the basis of facts we have now, that Mrs. Davis would either be safe for herself, or for patients, or for faculty to pursue a nursing education program."

The Executive Director supplemented these opinions in responding further to the College's inquiry whether Davis' hearing difficulties would prevent her from being licensed as a Registered Nurse by the state Board of Nursing (App. 138a-139a). While the Executive Director could not presently predict eligibility several years hence for taking the licensing examination, she did state that

> ". . . one requirement for eligibility to write the State Board Test Pool Examination leading to licensure as registered nurse . . . includes evidence that an applicant has no limitations, physi-

> cally, emotionally, or mentally, to prevent the applicant from practicing nursing, after licensure, without restriction of any kind on the license. From the facts presented . . . and the audiologist's report of Mrs. Davis's hearing capacity it is our opinion that Mrs. Davis has hearing limitations which could interfere with her safely caring for patients. This very situation, also in our opinion, could be highly frustrating to Mrs. Davis. . . .
>
> "We reiterate that each applicant for the licensing examination must provide evidence that he/she is able, if licensed, to practice nursing as legally defined without any restriction."

(7) In addition to noting these opinions of the Executive Director, the District Court further found that the testimony at the hearing showed "that in many situations such as an operation room, intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lip reading impossible" and that "in many situations a Registered Nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means." Finding 8.

(8) The District Court found that the College had denied Davis' application for admission upon the basis of these medical tests respecting her hearing defect. The College admissions authorities, in other words, concluded that Davis had a physical "inability and incapacity to serve in the Associate Degree Nursing Program" and felt that "she would be unable to serve as a Registered Nurse on completion of such program." Finding 9.

(9) Following the denial of Davis' application for admission in May of 1974, Davis visited the Office of the President of the College in June and asked that her application be reviewed again and reconsidered. This reconsideration request was granted, and a committee of staff nurses at the College reviewed all the available material, tests and records. This committee again voted to deny Davis' application. Davis made no further attempts to gain review through college procedures, although the record indicates that the College had a procedure for resolving intramural grievances that Davis could have invoked. See App. 162a. But the District Court found that in these circumstances "all parties concerned knew that the institution of any such [grievance] procedures would be, in essence, futile." Finding 10.

(10) At the evidentiary trial, Davis offered no testimony. She rested her case on the various letters, tests and other exhibits, referred to in the foregoing paragraphs, that had been offered into evidence by stipulation. The College, on the other hand, offered the testimony of various members of its nursing admissions staff, as well as the President of the College, all of whom testified to the effect that Davis "was not qualified or suitable for the Associate Degree Nursing Program by reason of her hearing disability." Finding 11. But Davis did elicit an admission, on cross-examination of the College's witnesses, that with special training and individual supervision she could perform adequately in some selected fields of training. See Appendix B of the petition for certiorari, p. 20a; 424 F.Supp. at 1346.

But such testimony also indicated that the additional supervision necessary in this case would have to be on a one-on-one basis, which would be impracticable and financially disastrous. See App. 35a, 46a, 51a-54a, 77a, 96a. More-

over, the witnesses repeatedly stressed that the College could certify a graduate of the nursing program only if she were safe and could function fully in all areas. See App. 35a, 51a-54a, 74a.

After noting that "the single major factor" in the denial was "her projected inability to be licensed as a Registered Nurse after graduation," the District Court concluded that such a denial was neither arbitrary nor capricious. And the District Court further concluded, on the implicit assumption that a private right of action lies under Section 504, that the College had not violated the Act. Section 504 was construed to mean that no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap renders the person unable to fully and effectively participate in the activity.

On appeal, the Fourth Circuit panel held unanimously that the District Court had erred in its reading of Section 504, particularly in light of certain H.E.W. regulations that post-dated the District Court determination. Davis' hearing handicap, said the panel, could not be considered by the College in determining whether she was "otherwise qualified" – within the meaning of Section 504 – for admittance to the nursing program. Hence the panel vacated and remanded the Section 504 portion of the District Court judgment so that the latter court could focus upon Davis' academic and technical qualifications for admission. And on that remand, the District Court was directed to give "close attention" to Davis' request for some form of "affirmative relief" by way of modifying the nursing program so as to accommodate Davis and her hearing disability. See Appendix A of the petition for certiorari, pp. 8a-10a; 574 F.2d at 1162.

The Fourth Circuit panel also affirmed the implicit ruling of the District Court that a private right of action is available under Section 504. But the panel suggested that on the remand the District Court might want to consider the doctrines of administrative exhaustion and primary jurisdiction, matters which had been raised on rehearing but not resolved by the Fourth Circuit.

Chief Judge Haynsworth, one of the members of the panel that heard the appeal, dissented from the denial of the College's petition for rehearing. And Judges Russell and Widener dissented from the denial of rehearing en banc, stating that "they would affirm the judgment of the district court." See Appendix A of the petition for certiorari, p. 1a; 574 F.2d at 1163.

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act of 1973 provides that no "otherwise qualified handicapped individual" shall be excluded from participation in any federally funded program or activity "solely by reason of his handicap." The central issue in this case revolves about the meaning and effect of the statutory phrase "otherwise qualified handicapped individual." That issue permeates all the questions presented.

The factual context of this case vitally affects the resolution of the statutory interpretation question, as well as all related questions. After a full hearing, the District Court below made extensive findings and conclusions respecting the nature of the respondent's hearing handicap and the physical ability of the respondent to participate safely and satisfactorily in the clinical aspects of the petitioner's Registered Nurse training program. Essentially,

the District Court found that respondent's hearing loss was so severe that she could not perform safely either in the RN training program or in her proposed RN profession. Of "particular concern" to the District Court was "the potential danger to future patients" in clinical situations where the hearing loss would affect the respondent's ability to sense and react to needs of the patients. By reason of those determinations, which were not contradicted by the Fourth Circuit, the District Court concluded that the respondent could not be considered "otherwise qualified" for participation in the petitioner's Associate Degree Nursing Program.

I

The first step in judicially interpreting a statute is to read the plain words used by Congress and to ascribe to those words their common meaning. The District Court below took that step and concluded that "otherwise qualified" can only be read to mean "otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." 424 F.Supp. at 1345. Principles of English grammar and the accepted dictionary definitions of "otherwise" and "qualified" fully support the District Court's reading of these words. In other words, an "otherwise qualified" handicapped individual is one who, despite his handicap, is fully qualified in all respects – including all physical qualifications that may reasonably and necessarily be requisite to participation in the activity in question.

What Congress said in Section 504 was that a handicap was not to be treated as a disqualification *per se*. What Congress did not thereby say was that a handicapped person should be relieved of the need for meeting all physical

and other standards by which all applicants for a program are assessed. Such legislative use of the "otherwise qualified" language is simply a technique for insuring that the beneficiary of a nondiscrimination duty must still satisfy all valid and reasonable qualifications imposed on all participants or applicants for participation in a program. See *United States v. Mississippi*, 380 U.S. 128, 138 (1965).

In this case, the Fourth Circuit abdicated its function of reading the plain words of Section 504. It relied instead on a selective and erroneous reading of certain H.E.W. regulations, which seemed to the Fourth Circuit to say that a handicapped person must be considered qualified if he is qualified in other respects that are in no way related to the handicap, i.e., academically. But the H.E.W. regulations, fairly read, do not support that interpretation of Section 504. On the contrary, the H.E.W. recognizes that Congress did not intend this language to refer to "persons who are qualified except for their handicap, rather than in spite of their handicap." See 45 C.F.R. Part 84, Appendix A, p. 376.

In sum, Congress intended in Section 504 that physical qualifications be maintained and applied to applicants for admission to postsecondary education programs, particularly where those programs involve clinical training and where safe participation requires full physical skills and dexterity. Any other interpretation necessitates the absurd assumption that Congress meant to waive all physical program qualifications for all those who are physically handicapped and to mandate their participation in programs and activities for which they may be quite unqualified in the physical sense – so unqualified, indeed, as to constitute a danger to themselves and to those around them.

Congress has made it abundantly clear in other sections of Title V of the Rehabilitation Act dealing with employment discrimination against the handicapped that the handicapped person – before he can claim any kind of discrimination – must be able to perform the essential functions of the job despite his handicap. In other words, he must still satisfy all job related physical and mental qualifications, at least if they are consistent with business necessity and the safe performance of the job.

It is fair to assume, therefore, that a clinical program solely designed to train those who are physically equipped to meet the demands of a particular job or profession must itself impose the identical physical and other qualifications used to determine entry into that job or profession. In this case, the petitioner's RN training program must apply the same rigorous qualifications as are necessary for service as a licensed professional RN. Indeed, the state licensing authorities depend upon the administrators of the RN training programs to weed out those who are physically and otherwise unqualified to treat the ill and the injured safely and competently.

The record in this case abounds with proof that a severe hearing loss, which compels respondent to rely a good deal on lip reading despite the use of a hearing aid, would pose numerous hazards to nursing patients, as well as to the nurse herself. And those hazards would be as present in a clinical training program as in licensed nursing situations. The District Court's findings in this respect are abundantly supported by the record and have not been challenged or disputed by the Fourth Circuit.

The conclusion thus becomes inescapable. The respondent Davis, with her severe hearing handicap, was simply not "otherwise qualified" within the meaning of Section 504.

She was not "qualified" to participate safely in the RN training program. The fact that her handicap made her unqualified does not mean that she was discriminated against or excluded because of her handicap. She was excluded solely because she was not qualified in the physical sense, physical disqualification being a quite different concept than a physical handicap. Any other conclusion would force upon the nursing profession and upon the untold thousands who need nursing care one who is not fully qualified to provide safe care.

II

In remanding the case to the District Court for further proceedings, the Fourth Circuit suggested that the District Court give "close attention" to respondent's claim for some sort of "affirmative relief" under Section 504 and certain H.E.W. regulations – particularly those dealing with modifying the academic requirements of an educational program and providing auxiliary aids for students with impaired sensory skills.

Even assuming that Section 504 authorizes some forms of affirmative action or relief, no such action or relief is appropriate in the circumstances of this case. Where, as here, the handicapped person has been found physically unqualified for participation in a clinical and physically demanding program, no amount of academic requirement modification can hope to make the applicant physically qualified. Nor can the use of auxiliary aids serve to overcome a serious and uncorrectible physical incapacity, particularly where the applicant is already using all known aids for a hearing deficiency.

What the respondent is really seeking is to be excused from those clinical courses and exercises in which she can-

not safely participate because of her hearing defect. In effect, she is seeking to become a poorly trained nurse, one who cannot adequately perform or even be trained to perform the essential physical skills of the RN profession. The concepts of affirmative action and of reasonable accommodation are simply not designed to assist any desire of a handicapped person to avoid the physical demands of a training program or of a profession.

III

Section 504 creates no express or implied right of action, at least before available administrative remedies have been exhausted, under the circumstances of this case.

The Fourth Circuit's determination that lower court precedent, particularly that created by the Seventh Circuit, dictates that a pre-administrative private right of action can be implied under Section 504 needs reexamination and correction. Neither the language nor the legislative history of Section 504 justifies such an implication. Indeed, the Seventh Circuit precedent relied upon, *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), contained the seeds of its own demise, for it recognized that if and when H.E.W. were to create some form of administrative remedy, such remedy would have to be exhausted before any private right of action could be implied. Some four months subsequent to the *Lloyd* decision, the H.E.W. did issue regulations that provide administrative remedies for individual claims of handicap discrimination or exclusion under Section 504.

Moreover, much of the search for an implied right of action under Section 504 has been mooted by the passage of the 1978 Amendments to the Rehabilitation Act. The new Section 505 of the Act recognizes that a private right of

action might be possible in a very narrow situation involving employment discrimination against a handicapped person pursuant to Section 504. Such a provision necessarily excludes private rights of action respecting exclusion of a physically unqualified handicapped person from a federally funded program or activity that is not primarily designed to provide employment in the program.

In any event, if any private right of action is to be implied under the circumstances of this case it must be of a post-administrative nature. The availability of H.E.W. review and possible correction of any individual claims of program discrimination against the handicapped makes applicable the principles of exhaustion of administrative remedies and of primary jurisdiction. The respondent here has made no attempt to exhaust her administrative remedies, and her court action must be dismissed as premature.

Finally, because the duty of federal fund recipients not to discriminate against the handicapped is so intimately involved with federal termination of funds where undue discrimination or exclusion of the handicapped has occurred, it is wise to siphon all individual complaints in the first instance to the agency entrusted by Congress to administer and implement the Section 504 obligations. Federal courts are ill-equipped to deal with such major policy matters in the first instance.

ARGUMENT

I

Section 504 of the Rehabilitation Act permits denial of admission to a RN nursing program of an applicant whose handicap prevents her from being qualified to render safe nursing services.

The core issue in this case concerns the interpretation and application of Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. §794. In pertinent part, Section 504 reads:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handi cap, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

The interpretative problem is this: What did Congress mean when it used the words "otherwise qualified handicapped individual" in Section 504? Is an individual "otherwise qualified" if the handicap itself prevents him from being totally or satisfactorily qualified? Can the capacity to function fully, safely and satisfactorily in a given program or activity be established as one of the qualifications to be satisfied by all applicants and participants, including those who are handicapped? Or must the handicap be entirely disregarded in assessing the individual's qualifications for a particular program or activity that requires the full use of all physical faculties for safe performance? In that context, are the handicapped person's qualifications to be assessed solely by academic or other non-physical standards? In sum, what role does the handicap itself play in determining whether a handicapped individual is "otherwise qualified" with-

ing the meaning of Section 504?

All these interpretative questions are posed in the context of applying the Section 504 language to a RN nursing school applicant whose hearing defect has been found so serious as to prevent her "from safely performing in both her training program and her proposed profession." Pet. App. 20a; 424 F. Supp. at 1345. The answers to such questions must therefore be an amalgam of the following factors: (1) congressional intent; (2) common sense; (3) the concerns of the handicapped; (4) the concerns of the public interest; (5) the concerns and the safety of those patients who would be under the nursing care of the handicapped applicant; and (6) the concerns of the institutions that provide federally funded programs and activities that are available to the handicapped.

A. The language of Section 504

Given the intrinsic difficulties of language, the first step in any analysis and interpretation of a statute is to read the words used by Congress, and to ascribe to those words their common meaning. As Mr. Justice Holmes once wrote, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339 (1929).

The District Court below used a "common sense" approach in reading the words of Section 504. See Pet. App. 19a-20a; 424 F. Supp. at 1345. Applying what it called the "ordinary common meaning" to the words "otherwise qualified," a meaning derived from Webster's Third New International Dictionary, the court read this language to be of a qualifying nature and

> . . . to mean that no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap, renders the person unable to fully and effectively participate in the activity. . . . Otherwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available.

In other words, an "otherwise qualified" handicapped individual is one who, despite his handicap, is fully qualified in all respects. The handicap is simply not a disqualification *per se*; but neither does the handicap relieve the individual from meeting all the qualification standards.

As illustrated by the result reached by the Fourth Circuit, another and perhaps more literal reading of Section 504 can be had, a reading that effectively removes the physical handicap from the scope of the "otherwise qualified" language. A person is to be considered "otherwise qualified" and thus admissible to a federally funded program if he or she is qualified in all respects other than, and without regard to, the handicap.

The Fourth Circuit did not reach this result by engaging in statutory semantics or doing its own reading of the Section 504 language. Rather it relied upon a selective and questionable reading of certain H.E.W. regulations and explanations of the statutory words, which had been released some time after the District Court's decision.[3] In effect,

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[3] The Fourth Circuit placed its main emphasis on an H.E.W. regulation (45 C.F.R. §84.3(k)(3)) that defines not an "otherwise qualified handicapped individual" but a "qualified handicapped person." The

the Fourth Circuit held that the administrative reading of the "otherwise qualified" language should take precedence over a prior and assertedly inconsistent judicial reading. Thus the District Court was held to have "erred" when (1) it found that respondent Davis was not "otherwise qualified" pursuant to Section 504, and (2) it considered the nature of Davis' handicap in order to determine whether or not she was "otherwise qualified" for admittance to the nursing program. And by substituting what it felt was the H.E.W. interpretation of the Section 504 words, the Fourth Circuit concluded that the focus of Section 504 in this case should have been "upon her academic and technical qualifications as required by the newly promulgated regulations." For that reason, said the Fourth Circuit, the petitioner College "must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability." Pet. App. 5a-8a; 574 F.2d at 1160-1161.

However obtuse this technique of reading the plain words of a statute, the reading that emanates from the Fourth Circuit's opinion may be stated thusly:

H.E.W. finds it necessary to omit the word "otherwise" in reading the key words of Section 504, in order to avoid an absurd reading of Section 504 which Congress did not intend but which the Fourth Circuit inadvertently incorporated in its decision. It is in that context that the H.E.W. defines a "qualified handicapped person" to mean one who "meets the academic and technical standards requisite to admission."

The Fourth Circuit also noted the H.E.W.'s official explanation of this reference to "technical standards" – as referring "to all nonacademic admissions criteria that are essential to participation in the program in question." See 45 C.F.R. Part 84, App. A, p. 377. The Fourth Circuit apparently assumed, since the H.E.W. explanation of "technical standards" stops at this point, that a physical handicap cannot implicate a technical or nonacademic standard of physical fitness that may be essential to participation in the program in question.

> No handicapped individual, who is "otherwise qualified" without regard to the handicap, shall be denied admission to, or excluded from participation in, any federally funded program "solely by reason of his handicap."

Under that reading, a severely handicapped person who is "otherwise" academically qualified could not be found physically unqualified from participating in any kind of program, no matter what physical qualifications might be essential to safe and effective performance.

As an exercise in applying the "ordinary principles of English prose," *Flora v. United States*, 362 U.S. 145, 150 (1960), the District Court's reading of Section 504 is more reasonable and more meaningful than that of the Fourth Circuit. The ordinary dictionary meaning of the words "otherwise qualified handicapped individual" conveys the thought that the handicapped individual must be "otherwise qualified," i.e., must in all "other respects" have complied with the "specific requirements or precedent conditions" for participation in a given program or activity.[4] In other words, the handicapped individual, like his non-handicapped counterpart, must satisfy all the qualifications (including any of a physical nature) that may reasonably have been set for the program in question.

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[4] Webster's Third New International Dictionary defines "otherwise," when used as an adverb, to mean "in other respects." The adjective "qualified" is defined to mean "having complied with the specific requirements or precedent conditions (as for an office or employment)." Putting these definitions together with the other important words of Section 504 produces the following: an individual who is handicapped but who in other respects has satisfied the specific requirements or precedent conditions for participation in a federally funded program or activity shall not be excluded from participation solely by reason of the handicap.

If there is any grammatical difficulty in so reading these words, it stems from the adverbial use of "otherwise."[5] But that difficulty need not detain us long. As used here, "otherwise" modifies the adjective "qualified." But the modification is not by way of excluding any kind or number of qualifications. Rather the modification is in the nature of setting apart the whole notion of qualifications from the statutory subjects of handicaps and discrimination. Such a usage of the word "otherwise" makes it an all-inclusive one with respect to any qualifications that a handicapped person must satisfy in seeking to participate in a particular program or activity. Whatever his handicap, the handicapped individual must be "otherwise" totally qualified. To read "otherwise" in any other manner would impute to Congress the absurd intent to relieve all handicapped individuals of any physical qualifications and to mandate their eligibility to participate in all programs and activities requiring high physical skills, provided only that they be academically qualified.

Moreover, the Section 504 use of the words "otherwise qualified" appears to be a typical legislative technique for making certain, in the course of establishing a new duty or protection with respect to a disadvantaged clas. of indi-

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[5] It has been noted that "otherwise" is a useful, even an indispensable adverb, provided that the context makes clear which of several meanings it carries. Follett, *Modern American Usage* 256 (1966). Section 504 uses the word clearly to mean "in other respects or circumstances," thus avoiding the various ambiguities that can accompany its usage. See also Nicholson, *A Dictionary of American-English Usage* 398 (1957); Fowler, *A Dictionary of Modern English Usage* 425 (2d ed. 1965).

The H.E.W. has sought to avoid the seeming difficulty with the use of the adverb "otherwise" by deliberately omitting it from its explanatory analysis of Section 504, "in order to comport with the intent of the statute." See 45 C.F.R. Part 84, Appendix A, p. 376.

viduals affected by some scheme or activity, that all relevant and lawful requirements or qualifications for participation in that activity, be recognized and that they remain applicable to the beneficiaries of the legislative command. For example, in *United States v. Mississippi,* 380 U.S. 128, 138 (1965), the Court dealt with a provision in the Civil Rights Act of 1870 (42 U.S.C. §1971(c)) that guaranteed the right of citizens "who are otherwise qualified by law to vote at any election" to be allowed to vote in state elections without distinction of race or color. The Court held that the "otherwise qualified" phrase "obviously meant that Negroes must possess the qualifications required of all voters by *valid* state or federal laws." 380 U.S. at 138. Congress said that, while the right to vote regardless of race was guaranteed, the black voter must still satisfy all the valid voting requirements imposed on all voters. Likewise, Congress has here said that, while the right to be free from handicap-discrimination is guaranteed, the handicapped individual must still satisfy all the valid or reasonable qualifications imposed on all participants in a particular program or activity. See also *Immigration Service v. Errico,* 385 U.S. 214 at 229 (1966) (dissent of Stewart, J.), dealing with the statutory phrase "otherwise admissible."

The sensibleness of this reading of "otherwise qualified" is enhanced by the accommodation that such an interpretation can make to the varying qualifications with respect to different programs and different individuals. One of the main difficulties with the Fourth Circuit's approach to these statutory words is not only its confusing assimilation of physical handicaps into the concept of physical qualifications but its wholesale elimination of physical handicaps as a basis for determining whether a rational requirement of physical fitness for a particular program has been satisfied. If the determi-

nation below stands, a handicapped person would have to be considered qualified *per se* for all hazardous and physically demanding programs, assuming he meets all academic or non-physical qualifications. True, the handicapped person could be considered fully qualified for a program that rationally involves no physical qualifications, such as a law school or political science program. But the point is that the Fourth Circuit's indiscriminate approach permits no distinction relative to the capacity of a particular handicapped individual to perform the physical demands of a particular program safely and satisfactorily.

We need pursue no further the Fourth Circuit's error in interpreting the "otherwise qualified" language, the error lying in the attempt "to show that the statute does not mean what it says." *United States v. Wurzbach,* 280 U.S. 396, 398 (1930). Suffice it to say that Congress has not said, and did not intend to say, that a handicapped individual need not satisfy whatever physical demands and qualifications a particular program may involve. Programs obviously vary as to the need and scope of physical qualifications, just as individuals vary as their capacity to meet necessary physical qualifications – whether or not they are handicapped. And Section 504, in its use of the "otherwise qualified" language, gives proper recognition to those facts of life.

In another and rather unfortunate context,[6] Mr. Justice Bradley long ago uttered a truism, a principle that is fully applicable as a guide in interpreting the "otherwise qualified"

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[6] The fact that Mr. Justice Bradley applied this principle to support the Court's outmoded and unfortunate conclusion that women constitutionally could be denied the right to practice law does not detract from the efficacy of the principle or its applicability in entirely different contexts.

words. In his concurring opinion in *Bradwell v. The State*, 83 U.S. (16 Wall.) 130 at 142 (1872), he wrote:

> In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence.

In enacting Section 504 and in using the words "otherwise qualified," Congress cannot be said to have rejected that principle. The plain words of the statute approve and perpetuate the principle.

B. The interpretation of Section 504

Nothing in the legislative history of Section 504 or of the Rehabilitation Act as a whole sheds direct light on the intent of Congress in using the "otherwise qualified" language in Section 504. But once Section 504 is read in the context of the entire Act, especially in relation to other statutory references to "qualified handicapped individuals," the conclusion becomes inescapable that Congress never intended Section 504 to mandate eligibility for participation in a physically demanding program by a handicapped person who cannot meet necessary physical qualifications. It is a conclusion fully buttressed by the interpretative regulations issued in 1977 by H.E.W., the agency entrusted with responsibility for establishing standards for compliance with Section 504. See 45 C.F.R. Part 84, §84.1 *et seq.*

Section 504 appears nearly at the end of Title V of the Rehabilitation Act, a title that is labelled "Miscellaneous."[7]

[7] Title V of the Rehabilitation Act appears at 87 Stat. 394 and is codified in amended form at 29 U.S.C. §§791-795.

The content of Section 504 is unrelated to the first four titles of the Act, which are devoted to insuring (1) that rehabilitation services will be delivered to a broad class of handicapped persons, especially those with the most severe handicaps, and (2) that research and rehabilitation technology will be improved under the direction of an upgraded Rehabilitation Services Administration.[8] Despite its "miscellaneous" label, Title V of the Act represents an important development in the recognition and protection of the rights and opportunities of the handicapped, particularly by way of guaranteeing them equal employment opportunities.

The substantive provisions of Title V are much concerned with the employment opportunities of the handicapped in various public and private sectors. Three sections of this title express that concern. Section 501 prohibits discrimination against handicapped employees of federal agencies. Section 503 requires that every federal contract in excess of $2,500 contain a provision that, in employing persons

[8] The first four titles of the Rehabilitation Act are an outgrowth and a consolidation of a long-expressed concern of Congress to help the handicapped through rehabilitation. That concern was first expressed in 1920 in the Vocational Rehabilitation Act (the Smith-Fess Act), 41 Stat. 735, dealing with the plight of World War I handicapped veterans. Major amendments to the Act were made at various times during and after World War II; as amended, the Act became codified at 29 U.S.C. §31 et seq. From the start, Congress was intent upon establishing a federal-state partnership to deal with the manifold problems of vocational rehabilitation of the handicapped, to the end that they might be rendered fit to engage in remunerative occupations and to live more normal lives. The Rehabilitation Act of 1973 repealed all the provisions and amendments of the Vocational Rehabilitation Act, and substituted its own provisions. See 29 U.S.C. §790.

All of this history is detailed in S.Rep. No. 93-318, 93d Cong., 1st Sess. (1973), reprinted in [1973] U.S.Code Cong. & Ad. News 2076, 2082-2090.

to carry out the contract, the private employer "shall take affirmative action to employ and advance in employment qualified handicapped persons."[9] Section 504, to the extent that it is deemed applicable to federally authorized jobs programs or to the employment practices of other federal aid recipients,[10] imposes a broad negative duty, a duty not to exclude or discriminate against the handicapped employee or applicant for employment. Together these three sections have been described as "the most significant legislative step taken thus far to guarantee them [the handicapped] equal employment." Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 Amer. U.L. Rev. 31, 41 (1977).[11]

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[9] The implementing regulations of the Department of Labor's Office of Federal Contract Compliance Programs also require that the affirmative action clause in each contract state that the contractor will not discriminate against any employee or applicant for employment "because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified." 41 C.F.R. §60-741.4.

[10] The Fourth Circuit has recently held that Section 504, which is patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d to 2000d-6, extends to the employment practices of aid recipients only where a primary objective of the federal aid is to provide employment. *Trageser v. Libbie Rehabilitation Center*, 18 F.E.P.Cases 1141 (4th Cir., Dec. 18, 1978). See also Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 Emory L. J. 65, 66, n. 6 (1977); Note, *Equal Employment and the Disabled: A Proposal*, 10 Colum. J. L. & Soc. Prob. 457, 468 (1974).

[11] During the congressional debate on Section 504, Senator Randolph noted that it constituted an attempt to "expand the vistas of opportunity for the handicapped individuals." 119 Cong. Rec. 24587 (1973). Senator Harrison Williams, a co-sponsor of Section 504, stated that Congress thereby intended to "bring the force of the Federal Government to bear in remedying discrimination against handicapped persons." Oversight Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies under the Rehabilitation Act of 1973: Hearings before the Subcomm. on the Handicapped of the House Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. 1502 (1976).

But the Section 504 duty not to discriminate solely by reason of a handicap extends far beyond the employment sector. Congress has expressly imposed this duty on those who administer "any program or activity receiving Federal financial assistance." The H.E.W., in its 1977 regulations implementing Section 504,[12] has identified four major types of programs and activities where the nondiscrimination duty applies:

(1) Employment practices.

(2) Preschool, elementary, secondary and adult education programs and activities.

(3) Postsecondary education programs and activities, including vocational education programs and activities.

(4) Health, welfare, and other social service programs and activities.

The instant situation falls within the above category (3). Petitioner's Associate Degree Nursing Program, to which respondent Davis sought admission, is a postsecondary education program. But it is something more than a postsecondary *academic* program. It is a postsecondary *clinical training* program, much like an apprenticeship. The nursing students are given "on-the-job" clinical RN training. As students, they perform precisely the kind of physical and mental tasks – including safe nursing care of bedridden patients – that they will be expected to perform once they secure licensure and employ-

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[12] See 45 C.F.R. Part 84, Subparts B, D, E and F.

ment as RNs. And since the RN must be totally qualified, physically and mentally and academically, to perform safely all essential functions of a RN, the applicant for the training program must be equally qualified to perform such functions. Only by training those who are fully qualified can the State license RNs who are able "to safeguard life and health." N.C.Gen.Stat. Ch. 90, Art. 9, §90-167 (1975).

In the context of this kind of a postsecondary clinical program, it becomes reasonable and indeed essential that the physical qualifications for safe participation in the clinical training program be identical with those needed for safe performance of the essential functions of the RN professional. A fully qualified RN is spawned by a fully qualified trainee. And by a like token, it becomes reasonable and indeed essential that Section 504's reference to the "otherwise qualified handicapped" applicant for a clinical nursing program be read consistently with the various legislative and administrative references to a "qualified handicapped" employee or applicant for employment – such as a RN employee or an applicant for RN employment. Otherwise Congress would be guilty of an absurd intent to force the training of handicapped individuals who are physically unqualified to perform the job for which they have been "trained." The concerns which this Court has recognized in "safe and efficient job performance," *Dothard v. Rawlinson*, 433 U.S. 321, 331, n. 14 (1977), would then be cast aside as respects safe and efficient job training.

Congress has exhibited no such absurd intent. Perhaps the best illustration of congressional concern and intent that a person's handicap not be disregarded in considering employment qualification is Section 503 of the Rehabilitation Act, 29 U.S.C. §793. The affirmative action promise there extracted from federal contractors relates to the employment of handicapped individuals, but only those who

are "qualified." As the administrative implementation of this "qualified" concept makes clear,[13] Congress was expressing a desire that business necessities and safe performance requirements not be sacrificed for the sake of expanding the employment vistas of the seriously handicapped. Thus, stitching together various interpretative regulations issued by Section 503's enforcing agency, the Labor Department's Office of Federal Contract Compliance Programs (OFCCP), produces the following profile of a "qualified handicapped individual" within the meaning of Section 503:

A qualified handicapped individual is one who

(1) Has a physical or mental handicap that substantially limits one or more of such person's major life activities (41 C.F.R. §60-741.2), and

(2) Is likely to experience difficulty in securing, retaining or advancing in employment because of the handicap (41 C.F.R. §60-741.2), and

(3) Is able, despite that handicap and difficulty, to perform a particular job, "with reasonable accommodation to his or her handicap" (41 C.F.R. §60-741.2), but

(4) May still be screened out by the employer, upon a review of the individual's physical or mental job qualifications, provided that the qualification requirements are "job related and are consistent with business necessity and the safe performance of the job" (41 C.F.R. §60-741.6(c)(1) and

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[13] Administrative interpretations of a statute by the enforcing agency, if supported by the statute and its legislative history, are "entitled to great deference" as "expressing the will of Congress." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971), and cases cited.

(2)). The qualification requirements must also be related "to the specific job or jobs for which the individual is being considered" (41 C.F.R. §60-741.6 (c)(2)).

In other words, the legislative intent in the Section 503 federal contractor sector has been translated to include a desire to retain all job related physical and mental qualifications, at least if they are consistent with business necessity and the safe performance of the job. If a particular handicapped job applicant cannot meet those job qualifications and thus cannot safely perform a particular job, even assuming reasonable accommodation to the handicap, Congress has not made the equal employment opportunity mandate applicable in that situation. Congress has simply not repealed all or any reasonable job qualification standards. It is inconceivable that anyone could suggest that Congress meant to effect such a repeal when it used the identical "qualified handicapped individual" language in Section 504, particularly as Section 504 relates to a federally funded job training program. If reasonable qualifications for a particular job may be enforced consistently with Section 503, those same qualifications would appear enforceable in a Section 504 program designed to train and prepare individuals for that particular kind of job.

Indeed, there is a certain universality to this congressional intent not to interfere with job related qualification standards. It is evident whenever Congress deals with matters of employment discrimination. There is no known instance where Congress has insisted that reasonable job qualifications be waived whenever the applicant is a member of a preferred or disadvantaged class.

An outstanding contrary instance is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h). That statute

makes it an unlawful employment practice to adversely affect an employee's status on account of race, color, religion, sex, or national origin. In assessing that statute, this Court has recognized that Congress did not thereby "guarantee a job to every person regardless of qualifications . . . [or] command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). And as the *Griggs* opinion further noted, 401 U.S. at 434, Title VII was designed by Congress (a) to protect the employer's right to insist that all prospective applicants meet the applicable job qualifications, and (b) to promote hiring on the basis of job qualifications, rather than on the basis of race or color.

Even within the confines of Section 504 of the Rehabilitation Act, as interpreted by the H.E.W., one can find substantial confirmation of this consistent legislative desire to retain and indeed promote all reasonable job related qualifications in the process of protecting a disadvantaged group like the handicapped from the evils of discrimination. With respect to the employment practices of those job related programs and activities subject to Section 504, the H.E.W. has defined "qualified handicapped person" to mean

> . . . a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question. [45 C.F.R. §84.3(k)(1)]

From that definition it follows that a handicapped person who, even with reasonable accommodation, cannot perform safely the essential functions of a particular job cannot be deemed qualified for that job. It would also follow that such a person cannot be deemed qualified to participate in

a program designed to train one to perform the essential functions of that job. But the essential point is that by the very use of the word "qualified" in Section 504, Congress obviously intended that job qualifications be respected and enforced wherever relevant. The H.E.W. regulation merely carries out that intent with a bit more specificity.

The final piece in this interpretative puzzle is an understanding that different kinds of Section 504 postsecondary education programs can involve different kinds of qualifications. A purely academic program, such as a political science or a legal education program, mainly begets academic qualifications; physical handicaps play virtually no role in establishing one's qualifications and capacity to perform the essentials of academic pursuit, though some degree of reasonable accommodation and physical assistance may be necessary in individual cases. But there are some programs, of which medical and nursing programs are prime examples, that are primarily designed to prepare the participants for employment in fields of endeavor that involve high degrees of physical and mental skills. While academic training forms a part of such programs, a prime emphasis must be placed on clinical activities identical to those which the future licensed doctor or nurse will perform.

In every sense, such postsecondary professional training programs call for the same physical and mental qualifications that are needed for entry in the professions themselves. And there is no more indication in Section 504 that Congress meant to eliminate physical qualification standards for participation in clinical training programs than there is with respect to the qualifications reasonably related to performance as an employed doctor or nurse. On the contrary, a proper reading of the relevant H.E.W. interpretative regulations – in the setting of professional clinical training programs – confirms a legislative intent to maintain appropriate

qualification requirements for entry and participation in such programs.

Thus in 45 C.F.R. §84.3(k)(3), the H.E.W. has defined the term "qualified handicapped person" to mean

> (3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

In its explanatory analysis of §84.3(k)(3), the H.E.W. has stated (45 C.F.R. Part 84, Appendix A, p. 377):

> Section 84.3(k)(3) . . . defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

The Fourth Circuit literally underscored the §84.3(k)(3) reference to the otherwise handicapped person meeting both "academic and technical standards." And it quoted without comment the H.E.W. explanation that "technical standards" refer to "all nonacademic admissions criteria." But the court inexplicably ignored the obvious – the fact that physical qualifications may and perhaps must be among the technical or nonacademic admissions criteria where the postsecondary program, in its clinical aspects, demands a full degree of physical dexterity and skill.[14]

[14] Defining the §84.3(k)(3) reference to "technical standards" as including physical qualifications for participation in a postsecondary clinical program finds a counterpart in the §84.3(k)(1) reference to the employment qualification of being able to "perform the essential functions of the job in question."

The obvious fact that physical qualifications can play a role in the admissions criteria of a clinical training program is confirmed by the H.E.W.'s own explanation of the §84.3 (k) reference to "qualified handicapped person." In its analysis of §84.3(k), the H.E.W. has explained (45 C.F.R. Part 84, Appendix A, p. 376):

> 5. "*Qualified handicapped person.*" Paragraph (k) of §84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

As if to emphasize still further that the ability to participate successfully in an educational program partakes of an enforceable qualification for admission thereto, the H.E.W. has made the same point as respects persons handicapped by being drug addicts or alcoholics. In an explanatory comment, the H.E.W. has indicated that such a handicapped person may be excluded from participation in a Section 504 education program only if his condition makes it impossible for him to "successfully participate in the education program." 45 C.F.R. Part 84, Appendix A, p. 376.

The totality of these H.E.W. analyses of Section 504 confirms the accuracy of the District Court's reading of the "otherwise qualified" language. That reading, moreover, is consistent with what the H.E.W. deems to be the intent of Congress in using these words. In sum, Congress intended that physical qualifications be maintained and applied to applicants for admission to postsecondary education programs, at least where physical skills and dexterity are essential to safe participation in the program.

Any other conclusion, to use the H.E.W. hypothetical, would lead to the absurd result of treating a blind person, who has all the qualifications for driving a bus except sight, as "otherwise qualified" either for the job of bus driving or for admission and participation in a federally funded bus drivers' training program. Only slightly less absurd is the result that has been reached in this case. A seriously deaf person, who presumably has all academic and technical qualifications to be a Registered Nurse except for the hearing handicap, has been judicially declared "otherwise qualified" to be admitted to a training program in which she cannot safely participate.

C. The application of Section 504

A case by case analysis has been said to be "the more appropriate and realistic method for determining whether a handicapped person is 'qualified' for protection" under Section 504. Note, *Rehabilitating the Rehabilitation Act of 1973,* 58 B.U.L.Rev. 247, 262 (1978). It thus becomes appropriate and realistic to assess the facts of this particular case to determine the propriety of the District Court's conclusion that respondent Davis was not "qualified" for participation in the petitioner's Associate Degree Nursing Program.

The short answer to that inquiry is that the District Court was correct. It proceeded on the correct premise that Section 504 was in no way designed to lift any physical qualifications necessary for safe performance in a clinical training program. And it properly found that such qualifications were not met by an individual whose severe hearing loss made safe performance impossible. The Fourth Circuit in no way disputed or disagreed with that ultimate and critical finding of the District Court.

The considerations that support the decisive finding of the District Court may be stated as follows:

(1) The petitioner College's Associate Degree Nursing Program is designed solely "to train people for licensing as Registered Nurses pursuant to the statutes of North Carolina." Finding 4. The licensing authorities of North Carolina make no independent or *de novo* physical examination of applicants for RN licensure; nor do they test such applicants in clinical settings.[15] Thus the responsibility for screening out those who are physically unqualified and incapable of safely performing clinical RN tasks lies exclusively with the College administrators of the Associate Degree Nursing Program.[16]

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[15] Under North Carolina law, as in all other States, an applicant for RN licensure need only take and pass a written examination, testing the applicant's "knowledge of nursing and related material basic to nursing." N.C.Gen. Stat. Ch. 90, Art. 9, §§90-168, 90-169 (1975). To qualify to take that examination, the applicant must (a) be of good moral character, (b) be a high school graduate, and (c) have completed the course of study and have graduated from an accredited educational unit in nursing. §90-170.

[16] To be accredited, the educational unit must establish an admission screening policy that includes "an evaluation of emotional and physical health status as well as scholastic attainment and personal characteristics." *Standards for Educational Units in Nursing*, adopted by the North Carolina Board of Nursing (1967), in effect at the time the respondent sought admission to the Associate Degree Nursing Program in 1974.

See also the petitioner's admission criteria (App. 110a-115a), which include the requirement that the student's application folder contain a medical record (App. 112a). It is also there stated that "serious consideration [will be] given to existing health problems" (App. 112a).

(2) The District Court's conclusion that Davis' handicap would prevent her from safely performing "in both her training program and her proposed profession" reflects one basic fact – that the student must safely perform within the Associate Degree Nursing Program all the physical and clinical tasks that a licensed RN must be capable of performing. By law, a licensed RN must be capable of performing "any act" in the "observation, care, and counsel of persons who are ill, injured, or experiencing alterations in normal health processes."[17] Obviously, those "acts" involve the use of both physical and mental skills; and in many bedside and operating room situations, the nurse's auditory and other sensory skills play an important and sometimes crucial role. Those are the on-the-job "acts" that constitute so much of the clinical training program.

Hence the training program exists primarily to train and prepare the RN trainee to perform "any act," including emergency acts, that the RN professional may be called upon to perform. Only by such a training program can the College certify to the state licensing authorities that a graduating RN candidate can practice "safe nursing." App. 71a. For that reason, the Associate Degree Nursing Program must incorporate substantial clinical experiences with actual patients in all types of hospital settings. As was stated by a lead instructor in that program (App. 71a):

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[17] See N.C. Gen. Stat. Ch. 90, Art. 9, §90-158(3)(a).

> We are not preparing a student, we are preparing a graduate. This is a person who is going to go out to practice nursing. When we are working in our school we are not preparing a student nurse, we are preparing a graduate nurse who can practice safely.

And in preparing a graduate nurse, the nursing program must be able to certify that the individual can practice all nursing skills safely – not just some skills or not just those where auditory perfection is immaterial. See App. 71a. There are, in short, no partially skilled RN professionals. There are no partial RN licenses. There are no nurse-patient situations where the health or safety of the patient should be jeopardized by the physical inability of the nurse to hear a faint cry for help. It follows that no individual, whatever her academic qualifications, should be accepted for RN training if she is physically incapable of performing all necessary nursing skills.

(3) As reflected by the District Court's conclusions, it is absolutely essential to the safety and well-being of patients that the RN professional and the RN trainee assigned to provide nursing care be physically able to cope with all kinds of patient needs and emergencies. And to that end it is necessary that she have available and in good working order all her human lines of sensory communication and perception. While not every nursing situation is a life and death matter, little imagination is required to project innumerable hospital scenes where a nurse with a serious hearing defect could constitute a hazard to the patient.[18]

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[18] Without a keen auditory sense, a nurse might not detect a slight but significant change in a patient's breathing or snoring pattern. Such auditory skills would be particularly important in attending infants and

But the hazards that such a nurse might pose to the patients might also constitute hazards to the nurse herself, as well as to those who supervise or train her. Nurses and nurse trainees are legally responsible for safe performance of the functions within their sphere. Like doctors, nurses run a constant risk of malpractice and negligence claims. See, generally, Lesnik, *Nursing Practice and the Law* 234-304 (2d ed. 1962). It is precisely in the area of the professional nurse's continuing duty to observe, to see and to hear a patient's symptoms and reactions, and then to take whatever action is deemed necessary for the patient's immediate safety, that legal liability for lack of due care most often arises. *Ibid.*, 264-268, and cases cited. And the negligence of a RN trainee can legally implicate the supervisor or administrator of the training program.[19]

The District Court's conclusion that the respondent's serious hearing handicap would prevent her from properly and safely participating in the Associate Degree Nursing Program – as well as functioning ultimately as a RN – is more than adequately supported by the record. By any conceivable standard of proof, the petitioner College bore its burden of proving that its physical qualifications were substantially related to the safe performance of both the training program

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critically ill patients who cannot talk. A deaf nurse might also have difficulty in detecting fine changes in a heartbeat. In an operating room, as the District Court observed, a deaf nurse who depended on lip reading to receive directions would be largely useless, since everyone wears masks over their mouths.

[19] See also N.C.Gen.Stat., Ch. 90, Art. 9, §90-171.5 (1975), which authorizes the North Carolina Board of Nursing, after notice and hearing, to revoke or suspend any license to practice nursing if it determines that, *inter alia*, the nurse is unfit or incompetent to pratice nursing by reason of negligence or habits, or is mentally or physically incompetent to practice nursing.

and the subsequent professional activity. Cf. *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 861-863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122; *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976). And see *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972), holding that the burden to show that employment qualifications are job related is lighter "when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great."

Indeed, the District Court's findings of fact have not been seriously contested by the respondent. Her hearing handicap is conceded, and her hazards to patients and to herself have not seriously been contested. Her major claim to date is that she has performed certain nursing functions as a LPN and that she can do certain acts within the realm of the RN.[20] But there are seeming provisos attached to that claim, for she must continue to use her hearing aid and she must continue to read lips for effective communication. And she is now apparently seeking additional kinds of special training, as well as individual supervision in her projected RN rounds.

Such a conditional claim misconceives the nature of the RN profession. It is a profession heavily involved with public health and safety. Nurses must be capable of providing

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20 It has been said that the "vital distinction between practical [LPN] and professional [RN] nursing is that by training and skill the professional nurse is obligated to interpret and evaluate facts in order to ascertain essential action that may be required. . . . It would seem that where the practical nurse exercises functions properly in the province of the professional nurse, she is engaged in an unlicensed and illegal activity." Lesnick, *Nursing Practice and the Law* 285 (2d ed. 1962).

total nursing care, rather than a care somehow modified to fit the physical handicaps of the nurses.

The conclusion is inescapable. The respondent Davis, with her hearing handicap, is simply not "otherwise qualified" within the meaning of Section 504. She is not "qualified" to participate safely in the RN training program. Any other conclusion would force upon the nursing profession, and upon the untold thousands who need or will need safe and competent nursing care, one who is not fully qualified to provide safe care.

II

Section 504 does not contemplate or authorize any kind of "affirmative relief" under the circumstances of this case.

The Fourth Circuit, in remanding the case below for further proceedings, suggested that the District Court give "close attention" to respondent's claim for some sort of "affirmative relief" under Section 504 and under certain H.E.W. regulations.[21] The Fourth Circuit rather cryptically added that precedent "supports the requirement of affirmative conduct on the part of certain entities under Section 504, even when such modifications become expensive." Appendix A of petition for certiorari, pp. 8a-9a; 574 F.2d at 1162.

These comments of the Fourth Circuit must be assessed in light of (1) its ruling on the "otherwise qualified" language of Section 504, and (2) the meaning and impact of any "af-

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21 The respondent pointed to five specific H.E.W. regulations: 45 C.F.R. §§84.42(a); 84.43(c); 84.44(a); 84.44(d); 84.12(a). The Fourth Circuit's opinion made particular reference to two of these regulations, and quoted from them: §84.44(a), dealing with modifications of academic requirements; and §84.44(d)(1), requiring that a recipient provide educational auxiliary aids for those with impaired sensory skills.

firmative relief" in the context of the undisputed facts of this particular case. Either avenue of inquiry leads to the conclusion that any form of "affirmative relief" is unwarranted in the statutory and factual circumstances.

At the outset, it must be emphasized that Section 504 imposes a broad duty on federal aid recipients not to discriminate against the handicapped solely because of their handicaps. But that duty is carefully limited by the section to what is described as the "otherwise qualified handicapped individual." If the handicapped person has been found "otherwise qualified" to participate in a federally funded program despite a handicap, then it can be said that in some situations a form of affirmative relief or accommodation may be necessary so as to equate the opportunity accorded the qualified but handicapped applicant with the opportunity available to the qualified non-handicapped applicant.[22] But if the handicapped person cannot meet the physical qualifications for the program involved, a question arises whether Section 504 was meant to authorize affirmative efforts either to remove the disqualification or to change the program by lowering or eliminating the qualification standards. In that event, affirmative action would be used to restructure many of the educational and clinical programs and activities that demand a high degree of physical dexterity; or the programs would have to be altered so as to produce physically unqualified graduates, unable

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22 One commentator has suggested that the term "qualified" ordinarily implies the absence of a need for any special accommodation, and that H.E.W. has committed "an error in logic" by imposing upon employers the duty to make reasonable accommodation for handicapped individuals who might in fact be "unqualified." Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 U. of Balt. L. Rev. 183, 269-270 (1978).

to perform their chosen tasks without endangering themselves or the public safety interests. This problem is more exacerbated in this case by the Fourth Circuit's ruling that effectively cancels all types of physical qualifications for participation in all postsecondary educational and clinical programs.

The Fourth Circuit's decision as to the meaning of Section 504's "otherwise qualified" language not only produces an absurd result but breeds even more absurd and insoluble problems. As indicated in Part I of this brief, the Fourth Circuit has ignored the proposition that Congress intended by Section 504 only to eliminate employment and program practices that exclude handicapped persons who are fully qualified and capable of safely performing the job or activity involved. Congress exhibited no intent to affect or erase physical qualification standards that are reasonably job-related or activity-related. But the Fourth Circuit seemingly held otherwise. And by so doing, that court has created a major problem of what kind of affirmative relief, assistance or accommodation can be used to mask the effect of the handicapped person's physical inability to participate safely. Did Congress design Section 504 so as to generate that kind of affirmative action? Can the concept of affirmative action or relief or accommodation be used to accomplish indirectly what Congress did not want done directly under Section 504 – i.e., eliminate or dilute standards of qualification reasonably related to job or activity performance?

These questions must also be asked against the background of the District Court's fact findings, fact findings that the Fourth Circuit did not disturb or query. Those findings establish that the respondent Davis has a serious hearing defect that renders unsafe her performance of many of the clinical

nurse-patient aspects of the RN training program; and the findings cast serious doubt on whether she ever could perform satisfactorily or safely the clinical tasks of the licensed RN. Serious problems of the patients' health and safety are implicated if the Fourth Circuit's suggestion of affirmative relief means that unqualified and unsafe handicapped nurses must be given the opportunity to be licensed and to serve as RNs. Indeed, what are the implications of this affirmative relief suggestion upon the licensing power of the States to control entry into the RN profession in terms of fully qualified applicants? If the respondent succeeds in the present action, will her next suit have to be brought against the North Carolina nurse licensing authorities to compel them to grant licensure to a physically unqualified RN training school graduate?

It should also be noted that the only kind of affirmative relief that the respondent here seems to suggest is one that would free her from the unfortunate consequences of her dangerous RN disqualification. There are only two possibilities in that respect: (1) she can ask to be excused from taking the clinical training courses in which her hearing handicap presents a safety problem; or (2) she can ask that she be accorded a preferential and personal one-on-one supervision, presumably being accompanied and shadowed at every step by a nursing supervisor or fully qualified aide who could transmit and translate to her each and every sound, word and whisper that might be significant and that she might not otherwise hear or heed. The first possibility seems to have been in the mind of the Fourth Circuit when it pointed to the H.E.W. regulation, §84.44(a), dealing with modifications of academic requirements. The second possibility has already been explored by respondent's counsel during the District Court proceedings. There he made repeated inquiries as to the College's willingness to provide greater supervision of the respondent at every step in the clinical program, presumably on a one-on-one basis. See App. 35a, 46a, 51a-54a, 77a, 92a, 96a. The answer given, of course, was that the College had neither the human nor the financial resources to over-accommodate one unqualified nurse trainee.[23]

Suffice it to say that there is no basis whatever in the language, structure or purpose of Section 504 that would justify a judicial ordering of either of the two consequences of respondent's requests: (1) an order restructuring a professional training program by eliminating the clinical aspects, so that an unqualified handicapped applicant may pursue only those academic courses that present no problem but which leave her quite untrained in the imporatnt clinical aspects of her chosen profession; or (2) an order that she be provided a preferential and protective supervision of a kind that would be totally impractical, counter-productive and financially impossible.

There are serious questions whether any kind of affirmative action can be had under Section 504. By its own terms and by its legislative history, Section 504 is completely silent on the matter. That silence is in sharp contrast to the companion Sections 501 and 503, both of which contain express

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[23] The instructors in the College's clinical training program were usually responsible for from 8 to 12 students in the less demanding clinical areas of the hospital. In the more demanding areas, the ratio was 1 to 4. See App. 46a, 77a, 92a.

When the lead instructor was asked if the College could provide additional supervision for the respondent, presumably on a one-on-one basis, she replied: "Dr. McCarter [the College president] would have to close the college, there is no way we can have that kind and she might, I don't know that could even do it then if she had a one to one, I don't know." App. 77a.

language authorizing some form of "affirmative action."[24] But this enigma of whether Section 504 impliedly authorizes any affirmative action or decree would be augmented tenfold were one to search Section 504 for justification of the drastic and far-reaching kind of affirmative action relief seemingly sought by the respondent and suggested by the Fourth Circuit.

It is apparently true that the concept of "affirmative action" is a fluid one, its nature changing with the context in which it arises. It seems to mean something different in each case, depending on the particular kind of discrimination involved and on whether the discrimination is likely to be cured or prevented through affirmative action. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). One commentator has observed that affirmative action, viewed from one perspective, is essentially a two-tiered concept: (1) it can be required by a court as part of a remedy for proven past discrimination; or (2) it can be required by legislative or executive action as a condition of securing and retaining some financial or contractual relationship with the United States. St. Antoine, *Affirmative Action: Hypocritical Euphemism or Noble Mandate?* 10 U.of Mich.J.Law Reform 28, 29 (1976). See also Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 So. Cal. L.Rev. 785, 801-803 (1976).

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[24] The contrast between the affirmative action provision in Section 503 and the absence of such a provision in Section 504 is heightened by the presence of regulations under Section 503 implementing the congressional call for affirmative action (41 C.F.R. Part 60-741), and the omission of such implementing affirmative action regulations in the H.E.W. regulations under Section 504 (45 C.F.R. Part 84). See Note, *Rehabilitating the Rehabilitation Act of 1973*, 58 B.U.L. Rev. 247, 252-254 (1978).

If there is any central theme in the general affirmative action concept, it is that it reflects a congressional desire to avoid putting or maintaining minority group members at a competitive disadvantage based on their minority characteristics. It is a concept that deals with classes of the disadvantaged, classes that by some sort of affirmative plan or decree can be brought up to a position of equality in opportunity with the competing majority classes. And it is a concept that deals largely with attitudes, majority attitudes toward racial, religious, national origin, sex and perhaps even age minorities. But the physically and mentally handicapped minorities are something quite different. It is more than a question of attitude. Handicaps are highly individualized in nature, and certainly cannot rise above the reasonable job-related qualification standards. Each handicapped individual must be treated as equal only to the extent that he is qualified to perform the job or the activity as to which he seeks equality of opportunity.

It seems useless, therefore, to try to ferret some language or policy out of Section 504 that would permit a court to order a generalized affirmative action program for hiring or admitting handicapped persons as a class, without regard to their individual qualifications or disqualifications. Congress simply did not deal with the problems of the handicapped in those general class terms. Section 504 on its face limits the concern of Congress, at least in the area of federally financed programs and activities, to those handicapped individuals who are "otherwise qualified." It is the fully qualified handicapped individual who must be given equal opportunity to participate in such programs and activities. And because some activities, like some forms of employment, are high risk ventures in terms of physical capacities, the opportunity and the qualification for becoming a participant in such a program cannot be dealt with in a generalized affirmative action way.

To the extent that the Fourth Circuit may have thought that its remand suggestions were justified under any such generalized affirmative action theory, the suggestions must be rejected. Secdtion 504 does not permit the use of that theory as to individual handicapped persons who are unqualified. Nor do these suggestions fare any better if it be thought that a lesser form of affirmative action, like the reasonable accommodation concept embodied in the H.E.W. regulations, can be extracted from the broad language of Section 504. Cf. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 331, n. 1 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971). Again, we are met with the immovable fact that this individual, this respondent, has been found by the fact finder to be physically unable to cope with the physical demands of the RN clinical training program. She must be considered unqualified to participate in that program, to say nothing of pursuing a career as a professional RN.

The reasonable accommodation possibilities offered by the H.E.W. regulations do not meet respondent's problem in being physically unqualified. Respondent already has her own auxiliary aids, in the form of hearing aids, and she has not asked the College for additional ones. So the auxiliary aid regulation quoted by the Fourth Circuit, §84.44(d)(1), offers no solution to respondent's qualification problem; even with auxiliary aids, she cannot hope to perform safely or satisfactorily the physical skills needed in the RN clinical training program. And with respect to the other H.E.W. regulation mentioned by the Fourth Circuit, §84.44(a), respondent does not want or need any modifications in the training program's "academic requirements." What she really wants are modifications in the clinical or physical requirements of the program – a subject which is not even addressed by the H.E.W. regulations. And that is

the very heart of this case. Only by seeking a deletion or limitation of the qualification standards can respondent hope to overcome the District Court's findings as to her disqualification and the hazards she poses to the health and safety of others if allowed to participate in the RN training program. But neither Congress nor the H.E.W. has responded to that hope.[25]

The short of it is that no "reasonable accommodation" to respondent's physical disqualification is possible. When the disqualification is due solely to a physical defect, rather than to any intent to discriminate against a qualified handicapped individual solely because of the handicap, there is no kind of affirmative action or reasonable accommodation that can make an unqualified person's capacity or opportunity to participate in a program the equivalent of that of a qualified person.

One final word is in order with respect to the public safety and health aspect of this case, as embodied in the District Court's findings. That factor alone, the danger that a physically ill-equipped nurse poses to the health and welfare of her patients, serves to render reasonable the physical qualifications that have been established for entry into RN training programs and the RN profession. And this factor renders unreasonable any cost the petitioner College might incur in trying to accommodate the RN training program

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[25] In §84.4(b)(2), the H.E.W. has stated that auxiliary aids are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons. Rather, the aids "must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs." Obviously, such aids cannot help an unqualified handicapped person achieve a level of qualification that his disability, given the assistance of aids, will not permit.

to meet the limited physical capacity of this particular applicant. Any affirmative accommodation in these circumstances becomes "unreasonable" and any hardship incurred by the College becomes "undue." Cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 72 (1977). Ultimately, of course, such an accommodation infringes upon what Mr. Justice Powell in *Bakke*, 437 U.S. ___, called the "freedom of a University to make its own judgments as to education," which "includes the selection of its student body."

III

Section 504 creates no express or implied private right of action, at least before available administrative remedies have been exhausted, in the circumstances of this case.

The Fourth Circuit determined that the District Court's implicit finding that respondent Davis could pursue a private right of action under Section 504 was "legally sound," citing what it called the "sound reasoning" of the Seventh Circuit in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977). Certain other Circuits have similarly cited the *Lloyd* ruling as indicative of the "probable" existence of such an action. *Kampmeier v. Nyquist*, 533 F.2d 296, 299 (2nd Cir. 1977) stating that the *Lloyd* reasoning is "fairly persuasive here" so that it is "probable" that the *Kampmeier* plaintiffs had standing to bring such action); *United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Leary v. Crapsey*, 566 F.2d 863, 865 (2nd Cir. 1977). Some federal district courts have also cited the *Lloyd* decision in concluding that a private right of action can be implied from Section 504.[26] Other

[26] See *Bartels v. Biernat*, 427 F. Supp. 226, 229-230 (E.D. Wis. 1977); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809, 916 (E.D. Pa. 1977); *Duran v. City of Tampa*, 430 F. Supp. 75, 77 (M.D. Fla. 1977); *Barnes v. Converse College*, 436 F. Supp. 635, 638 (D. S.Car. 1977); *Halderman v. Pennhurst State School*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1977); *Camenisch v. University of Texas*, No. A-78-CA-961 (W.D. Tex., May 17, 1978).

district courts have stressed the peculiar facts and timing involved in *Lloyd* and have recognized that a private right of action is "probably" available only under certain circumstances.[27]

But the foundations of the "sound reasoning" of *Lloyd* have been described as tenuous at best and in need of reconsideration.[28] Moreover, there are hard problems raised by the decision below in the instant case that simply were not addressed or answered in *Lloyd*. It would be unfortunate, therefore, if the *Lloyd* rationale were to be allowed to pick up speed as the leading authority for the proposition that Section 504 gives an implied right of action to any and all handicapped applicants who are denied admission to a federally-financed program.

[27] See *Crawford v. University of North Carolina*, 440 F. Supp. 1047, 1055 (M.D.N.C. 1977); *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 203-204 (N.D. Tex. 1977); *Doe v. New York University*, 442 F. Supp. 522, 523-524 (S.D.N.Y. 1978); *Vanko v. Finley*, 440 F. Supp. 656, 659 (N.D. Ohio, 1977); *Sherer v. Waier*, 457 F. Supp. 1039 (W.D. Mo. 1978).

See also the divided district court authorities cited in Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 Emory L.J. 65, 98, note 108 (1977); Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 Baltimore L. Rev. 183, 204, note 70 (1978).

[28] Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse*, 29 Mercer L. Rev. 745, 751-756 (1978).

A. Reconsideration of the *Lloyd* rationale

Much of the *Lloyd* rationale is dubious, outdated and in dire need of reconsideration. Thus, after noting that Section 504 tracks Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d, the *Lloyd* court asserted that *Lau v. Nichols*, 414 U.S. 563 (1974), held that Section 601 provided a private cause of action – ergo Section 504 provides a cause of action for the handicapped applicant. The difficulty here is that *Lau* made no attempt to discuss or resolve the private right of action issue; the Court simply declared a particular education practice violative of Section 601.[29]

Indeed, the Seventh Circuit itself has repudiated this notion that *Lau* is controlling as to the existence of a private right of action as to a similar analog, Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. In *Cannon v. University of Chicago*, 559 F.2d 1063, 1072 and 1083 (7th Cir. 1976, 1977), both in the original decision and on rehearing, the Seventh Circuit acknowledged (p. 1083) that "*Lau* simply cannot be read as supporting the proposition that private parties have an implied cause of action under Title VI that would mandate implication of a

[29] In *Lau*, the Court held that a public school system's failure to provide English instruction for 1800 students of Chinese ancestry who did not speak English was a denial of an equal educational opportunity and hence violative of Section 601. The suit had been brought as a class action, but the Court did not discuss or confront the problem as to the right to bring such a suit. See 414 U.S. at 568. Mr. Justice Blackmun's concurrence stressed the large number of children involved who were being deprived of any meaningful education. See 414 U.S. at 572. Mr. Justice Stewart's concurrence stated that the critical question at issue was whether certain H.E.W. guidelines and regulations wnet beyond the authority of Section 601. 414 U.S. at 571.

private right of action here under the comparable provisions of Title IX [Section 901]." It would seem equally clear that the Seventh Circuit has repudiated that portion of its *Lloyd* opinion that relied upon *Lau* for the proposition that Section 504 gives rise to a private right of action. *Lau* is no longer thought to provide a precedential base for implying a private right of action under Section 504, or any analogs thereof.

Further elucidation of this matter is likely upon this Court's review of *Cannon*, now awaiting decision by the Court. No. 77-926.

B. No Basis or Need for Implying Private Remedy

Alternatively, the *Lloyd* court held that a private right of action could be had under Section 504 by resort to the doctrine of implication, as developed by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1974). But it is questionable whether the second and third facets of that doctrine,[30] relating to legislative intent, have been satisfied in the case of Section 504. In commenting on the 1974 amendments to the Rehabilitation Act, the Senate Committee on Labor and Public Welfare noted that Section 504 would "permit

[30] In *Cort*, this Court found four factors relevant in determining whether a private judicial remedy is implicit in a statute not expressly providing one: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny such a remedy; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally related to state law, thus rendering it inappropriate to infer a cause of action based on federal law. 422 U.S. at 78.

a judicial remedy through a private action," but seemingly only after there had been some administrative implementation of a compliance program.[31] There is not a word in Section 504 or in its legislative history that permits or contemplates an independent private action by the handicapped person prior to any kind of administrative action by the H.E.W.

But the passage of the 1978 Amendments has mooted the search for implications of a private right of action under Section 504. Those amendments have made it plain that such a cause of action is available in a very limited situation, thereby excluding the availability of a private remedy in all other situations. And the promulgation of H.E.W. regulations in 1977 has created an administrative path for those in the respondent's shoes to follow before instituting any conceivable court action.

C. Effect of the 1978 Amendments

The 1978 Amendments to the Rehabilitation Act did two significant things: (a) it recognized that certain limited types of private suits might be brought under the Act, including Section 504, but (b) it confirmed the continuing absence of a private right of action under Section 504 in the context of a federally funded program or activity not primarily designed to provide employment. The instant case, of course, falls into category (b).

The new Section 505 of the Rehabilitation Act, added by the 1978 Amendments, makes a sharp distinction between the "remedies, procedures, and rights" which may be

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[31] S. Rep. No. 93-1297, 93d Cong., 2d Sess. (1974), reprinted at [1974] U.S. Code & Admin. News, 6373, 6390-6391.

asserted under Section 501 of the Act and those that are available under Section 504. Section 505(a)(1) provides that federal employees aggrieved by some act of discrimination under Section 501 shall have the remedies, procedures and rights set forth in Title VII of the Civil Rights Act of 1964. Section 706(f) of that Act, 42 U.S.C. §2000e-5(f), does give an aggrieved person a private right of action after exhausting prescribed administrative procedures. Hence an aggrieved handicapped federal employee now has a similar cause of action.

But the new Section 505(a)(2) directs those aggrieved under Section 504 not to Title VII but to Title VI of the Civil Rights Act of 1964. And Title VI contains a significant limitation not found in Title VII. Section 604, which is a part of Title VI of that Act, 42 U.S.C. §2000d-3, limits suits by federal departments and agencies under Title VI to those racially discriminatory employment practices by recipients of federal aid where "a primary objective of the Federal financial assistance is to provide employment." The Fourth Circuit, in *Trageser v. Libbie Rehabilitation Center*, 18 F.E.P. Cases 1141 (4th Cir., Dec. 18, 1978), has recently held that this Section 604 limitation applies – by virtue of the new Section 505(a)(2) of the Rehabilitation Act – to complaints brought by aggrieved handicapped individuals under Section 504.

In other words, there can be no private right of action under Section 504 unless a primary objective of funding the program or activity is to provide employment. It cannot here be claimed that a primary objective in giving federal funds to the petitioner College was to provide employment. The primary and indeed the only function of the Associate Degree Nursing Program was to train nurses. And the respondent Davis was in no position to claim any discriminatory employment practice; she was an aggrieved pro-

gram applicant, not an aggrieved job applicant. Thus by the words and logic of the 1978 Amendments we return to the original proposition that, at least in the circumstances of this case, Congress never intended to accord an aggrieved program applicant a private right of action. See also the separate opinion of Mr. Justice White in *Bakke*, 437 U.S.___.

Moreover, the allowance of attorney fees under the new Section 505(b) of the Rehabilitation Act, also enacted as part of the 1978 Amendments, lends no basis for implying a private right of action under Section 504 in these circumstances. The attorney fee provision simply implements the new understanding in Section 505(a) that certain designated causes of action can be brought by federal employees or by the employees or applicants for employment in federally funded work programs.[32] Standing by itself, Section 505(b) does not purport to create or recognize any cause of action not otherwise specified by Congress. To be sure, if this Court were to hold that other kinds of private suits could be implied from the language of Section 504, the attorney fee provision of Section 505(b) is ready to implement that possibility.

During the debates on the 1978 Amendments, several Senators did state that it had been "the continuing intention of Congress" that private actions be allowed under Section

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32 Various *amici* have suggested that this new provision for attorney fees is also consistent with the intent, expressed by a Senate report in connection with the Rehabilitation Act Amendments of 1974, 29 U.S.C. §706, that a recipient of federal financial assistance would have post-administrative judicial review – but that a handicapped individual would have no private right of action in court. Such a recipient would now be entitled to attorney fees if successful in court. See S.Rep. No. 93-1297, 93rd Cong. 2d Sess. (1974), reprinted in [1974] U.S.Code Cong. & Ad.News, 6373 at 6390-6391.

504. See 124 Cong. Rec. S 15590-15593 (Sept. 20, 1978 daily ed.); S.Rep. No. 95-890, 95th Cong. 2d Sess. 19 (1978). Such remarks contribute little if anything to the search for the legislative intent in enacting Section 504 in 1973. They "suggest only that some members of Congress may have assumed that private suits were authorized." *Cannon v. University of Chicago*, 559 F.2d 1063, 1079 (7th Cir. 1977). And since they are expressions by members of a later Congress dealing with a different and subsequent section of the Act, Section 505, they are "entitled to little if any weight." *Teamsters v. United States*, 431 U.S. 324, 354, n. 39 (1977). Whatever force these statements might otherwise carry has been overcome in any event by the plain and limiting words of the new Section 505(a). They simply spoke in terms larger than allowed by the 1978 Amendments then under consideration.

D. Doctrines of Exhaustion and Primary Jurisdiction

The Seventh Circuit permitted a private action in the *Lloyd* case only because no administrative enforcement procedures had at that time been established, an omission that has now been cured. In footnote 29 of the *Lloyd* opinion, 548 F.2d at 1286, the Seventh Circuit stated:

> "We expressly leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review . . . . And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . But assuming a meaningful administrative enforce-

ment mechanism, the private cause of action under Section 504 should be limited to *a posteriori* judicial review."

Since a "meaningful administrative enforcement mechanism" was established in May of 1977, the time has come to fill in what was deliberately left open by the *Lloyd* footnote, i.e., to determine that only a post-administrative judicial review is possible under Section 504. Where, as in the instant case, a private suit is brought that is clearly of the pre-administrative variety, it is no longer possible simply to cite the *Lloyd* ruling – as the Fourth Circuit did – as authority for implying a pre-administrative private right of action from the stark language of Section 504. One must now give attention to the fact that §84.61 of the 1977 H.E.W. regulations (45 C.F.R. Part 84) makes the "procedural provisions applicable to Title VI of the Civil Rights Act of 1964" apply to Section 504 claims of handicap discrimination or exclusion. Those Title VI procedures, in turn, are found in 45 C.F.R. Part 81, §§80.6 - 80.10. In particular, §80.7(b) contemplates the filing of an administrative complaint by an aggrieved individual. Presumably the administrative determination could then be subjected to some form of judicial review (see §80.11).

If some sort of private right of action is to be found at the post-administrative stage, the doctrine of exhaustion of administrative remedies, as well as the doctrine of primary jurisdiction, become dispositive of any attempt by a handicapped individual to institute suit at the pre-administrative stage. Several district courts, attempting to follow the implications of the *Lloyd* decision, have barred private suits under Section 504 where the plaintiffs have not exhausted the new H.E.W. administrative remedies dealing with discrimination complaints. *Doe v. New York University*, 422 F. Supp. 522, 523-524 (S.D.N.Y. 1978); *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977);

and see *Vanko v. Finley*, 440 F. Supp. 656, 659 (N.D. Ohio, 1977) (primary jurisdiction).

The Fourth Circuit sought to avoid the implications of the exhaustion and primary jurisdiction doctrines, which had been raised at the rehearing stage, by suggesting that the District Court consider these matters on the remand. See footnote 9 of the opinion below. Just why a remand was necessary to resolve such legal propositions was not made clear. Such matters should and can be considered and resolved as part of the continuing problem of determining what private remedies are available under Section 504 and when they may be invoked.

Since administrative remedies are now available before the H.E.W., extended discussion of the doctrines of exhaustion of administrative remedies (see *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)) and of primary jurisdiction (see *Nader v. Allegheny Airlines*, 426 U.S. 290, 303 (1976)) becomes unnecessary. Those doctrines combine to require that the respondent, as an aggrieved applicant for admission to a Section 504 program, first seek redress through the H.E.W. channels. Whatever private right of action might be found to secure review of the H.E.W. determination could then be asserted.

Requiring such an exhaustion is particularly appropriate in a Section 504 situation because of the obvious connection between federal funding of a program and handicap discrimination or exclusion by the program. The H.E.W. should be alerted in the first instance to an individual claim of discrimination so that it may seek to conciliate and resolve the problem with the program administrators. The ultimate sanction, of course, and one that Congress contemplated, would be a termination of federal funding. Such major problems of policy and judgment should not

be handled in the first instance by the federal courts. They belong in the agency designated by Congress to implement the policies of Section 504.

CONCLUSION

For these various reasons, the judgment of the Fourth Circuit should be reversed, with directions that the judgment of the District Court be reinstated.

Respectfully submitted,

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